

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1806

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXXON CORPORATION,
Plaintiff-Appellant

v.

THE CITY OF NEW YORK, EPA OF N.Y.C.
& ADMINISTRATOR OF EPA OF N.Y.C.

Defendants-Appellees

GETTY OIL CO., (Eastern Operations),
INC., GULF OIL CO.-U.S., MOBIL OIL
CORPORATION & SUN OIL COMPANY OF
PENNSYLVANIA,

Plaintiffs-Appellants

v.

THE CITY OF NEW YORK, HERBERT ELISH,
Environmental Protection Administrator
of the City of New York, and
THE ENVIRONMENTAL PROTECTION ADMINI-
STRATION OF THE CITY OF NEW YORK,
Defendants-Appellees.

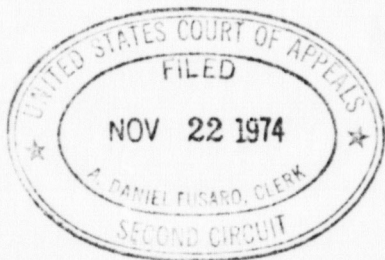
SUPPLEMENTAL BRIEF

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POINT I

THE FEDERAL HEALTH CONTROLS FOR
LEAD ADDITIVES IN GASOLINE ARE
INVALID BECAUSE THE ADMINISTRA-
TOR HAS FAILED TO PROMULGATE
LEAD EMISSION STANDARDS.
ACCORDINGLY, THE CITY'S ADDITIVE
CONTROLS ARE NOT PREEMPTED.

The issue on this appeal is whether gasoline lead additive restrictions contained in the City's Air Pollution Control Code have been preempted by the promulgation of federal lead additive controls. In our initial brief we took the position (accepted by the Court below) that since the federal controls, by their express terms, would not be applicable until January 1, 1975, preemption could not possibly occur until that date. We now contend that the federal controls were improperly promulgated and thus void ab initio; this being so, it follows that there are no federal controls upon which to predicate an argument that the City's lead additive controls are or will be preempted.

Specifically, 42 U.S.C. §1857f-6c, the provision of the Clean Air Act pursuant to which the USEPA Administrator promulgated the lead additive controls upon which plaintiffs rest their preemption argument,

provides that fuel additive controls may be promulgated for public health purposes only after consideration of

medical and scientific evidence ...
including consideration of other
technologically or economically
feasible means of achieving emission
standards under section 1857f-1.

42 U.S.C. §1857f-6c(c)(2)(A). This language plainly contemplates that controls will be promulgated for a particular fuel additive only after emission standards have been established for that additive. And the legislative history of the statute fully supports this conclusion. Representative Staggers, the floor manager of the House version of the Clean Air Act Amendments of 1970, explained that gasoline lead additive controls could not be promulgated before findings were made regarding lead emission standards established pursuant to 42 U.S.C. §1857f-1. See 116 Cong. Rec. 19229-30 (June 10, 1970). Since the Administrator to date has failed to promulgate lead emission standards, he lacks authority to promulgate lead additive controls,

as he has purported to do.*

Although perhaps not technically relevant to the issues herein, it is noteworthy that the Administrator's failure to promulgate lead emission standards constitutes an independent violation of the Clean Air Act. 42 U.S.C. §1857f-1 requires the promulgation of emission standards for any air pollutant which in the judgment of the USEPA Administrator endangers public health. The Administrator has, in fact, already determined that airborne lead poses a significant health hazard, especially in urban areas. See 38 Fed. Reg. 33734 (December 6, 1973). Thus, lead emission standards must be established under section 1857f-1.

* Section 307 of the Clean Air Act (42 U.S.C. §1857h-5) does not preclude the City from raising the defense herein asserted. Subdivision (b)(1) of that section prohibits, inter alia, a petition for review of an additive control promulgated by the Administrator, after 30 days from the date of such promulgation. That prohibition, however, does not preclude a challenge to a control when such challenge is raised defensively. See 42 U.S.C. §1857h-5(b)(2). Similarly, since the instant challenge to the validity of the Administrator's lead additive controls is not being raised in an enforcement proceeding, subdivision (b)(2) of section 307 does not preclude such challenge.

Indeed, the 30 day review period in section 307 in all likelihood applies only to challenges addressed to the substance of regulations promulgated by the Administrator. If the promulgation of an additive control or any other standard is procedurally defective, the control is void ab initio, and the passage of 30 days does not render it legally enforceable.

POINT II

ALTERNATIVELY, THE CAUSE SHOULD
BE REMANDED TO THE DISTRICT COURT
TO PERMIT AN APPLICATION FOR
LEAVE TO AMEND THE ANSWERS.

If this Court should determine that this application raises an issue not raised by the pleadings in the District Court*, the Order accepting the appeal pursuant to 28 U.S.C. §1292(b) should be vacated and the cause should be remanded to the District Court in order that the defendants may move for leave to amend their answers pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. See, e.g., First National Bank of Cincinnati v. Pepper, 454 F. 2d 626 (2d Cir., 1972). Appeal pursuant to §1292(b) is discretionary and may be dismissed by the Court as improvidently granted before reaching the merits of the appeal. See, e.g., Waters v. Western Company of North America, 436 F. 2d 1072 (9th Cir., 1971).

An application to the District Court for leave to amend the answers would not be inappropriate at this juncture in the litigation. Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend

* Since the City's Answers interpose general denials to plaintiffs' claims of preemption, we believe that any argument in opposition to preemption is properly within the scope of the pleadings.

pleadings "shall be freely given when justice so requires." The lapse of time between filing the original answers and our prospective motion to amend would be relevant primarily to determine possible prejudice to the other parties. But mere delay, in the absence of prejudice, is insufficient to warrant denial of a motion to amend. Fli-Fab, Inc. v. United States, 16 FRD 553 (D.R.I., 1954), Adams v. Beland Realty Corporation, 187 F. Supp. 680 (E.D.N.Y., 1960). In fact, amendments are allowed at a stage much later than that presented here, including after reversal and remand. See 3 Moore's Federal Practice ¶1508, p. 902.

Here there is no question of prejudice to the plaintiffs as a result of allowing amendment to the answers because all that is raised is a new legal argument which is a variant of the issue of preemption which has already been briefed and argued below. The argument raises no issues of fact and will not require a trial.

Conversely, the interests of justice require that argument be heard because we raise the question of whether the federal lead controls, which under the regulations as presently promulgated would otherwise

seemingly preempt non-identical local regulations on January 1, 1975, were properly promulgated. A determination that the Federal controls were not properly promulgated would, of course, vitiate their preemptive effect and permit the City to enforce its more stringent lead restrictions. In light of the substantial health hazard ambient lead poses for inhabitants of a concentrated urban area such as the City (see 38 Fed. Reg. 33734), it is respectfully urged that the public interest would be best served by allowing the defendants an opportunity to present their argument that the federal controls are void.

CONCLUSION

DEFENDANTS SHOULD BE GRANTED LEAVE TO FILE A
SUPPLEMENTAL BRIEF OR, IN THE ALTERNATIVE, THE CAUSE
SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERA-
TION OF AN APPLICATION TO AMEND THE ANSWERS.

Dated: New York, New York
November 12, 1974

Respectfully submitted,

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By:


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Of Counsel,

EVELYN J. JUNGE,
ALEXANDER GIGANTE JR.,
SCOTT KEGELMAN

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

ALEXANDER GIGANTE JR. being duly sworn, says that on the 13th day
of NOVEMBER 1974, he served the annexed BRIEF upon
SHEA, GOULD CLIMENKO & KRAMER Esq., the attorney for the G. ETTY, GULF, MOBIL & SUN
herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
United States in said city directed to the said attorney at No. 330 MADISON AVENUE in the
Borough of MANHATTAN, City of New York, being the address within the State theretofore designated by
him for that purpose.

Sworn to before me, this

14th day of NOVEMBER 1974

Lou Walters
LOU WALTERS
Notary Public in and for the State of New York
No. 249523720
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

Form 323-SOM-701108(71)